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January 21, 2015

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Protecting and Promoting the Open Internet*, GN Docket No. 14-28

Dear Ms. Dortch:

In the *2010 Open Internet Order*, the Commission found that last-mile eyeball broadband Internet access services providers pose a serious threat to the Open Internet.[1] Such providers, the Commission observed, have the incentive and the ability to discriminate in favor of their own and affiliated video and voice services, and against over-the-top competitors, as well as to extract monopoly rents from all who wish to exchange traffic with their end users.[2] The Commission further found that to extract these rents and to effectuate this discrimination, broadband Internet access service providers have the incentive and ability to allow their "basic" level of service to congest and deteriorate, so as to force providers into a paid arrangement.[3] Notably, a broadband Internet access service provider's ability to act on these incentives does not depend on it possessing market power with respect to end users—a terminating access monopolist controls the only means of access by which others may reach the end user regardless of whether the end user itself had a competitive choice.[4] But, the Commission found, the possession of such market power with respect to end users would make the problem all the worse.[5] And of course, there is no effective competition to restrain broadband Internet access service providers' exercise of market power over mass-market consumers: the vast majority of consumers have, at most, a single option for high-speed wired broadband, and virtually no households have more than two

[1] *Preserving the Open Internet*, GN Docket No. 09-191, et al., Report and Order, FCC 10-201, 25 FCC Rcd 17905 (2010) (*2010 Open Internet Order*). *See also* Letter from Angie Kronenberg COMPTEL, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 (filed Jan. 13, 2015).

[2] *See 2010 Open Internet Order* ¶¶ 21, 24, 32.

[3] *See id*. ¶ 29.

[4] *See id*. ¶ 32.

[5] *See id*.

choices.[6] The Commission's findings were affirmed by the D.C. Circuit, and they have not been seriously disputed since.[7]

These uncontroversial findings were the basis for the Commission's no-blocking and non-discrimination rules:

> **No Blocking:** A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.[8]
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> **No Unreasonable Discrimination:** A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not unreasonably discriminate in transmitting lawful network traffic over a consumer's broadband Internet access service. Reasonable network management shall not constitute unreasonable discrimination.[9]

These rules prohibited access tolls. The Commission was emphatic that its no-blocking rule forbade access tolls: "concerns have been expressed that broadband providers may seek to charge edge providers simply for delivering traffic to or carrying traffic from the broadband provider's end-user customers. *To the extent that a content, application, or service provider could avoid being blocked only by paying a fee, charging such a fee would not be permissible under these rules*."[10] Moreover, the Commission explained, its no-blocking rule did not just ban "outright blocking," but also "impairing or degrading" services "so as to render them effectively unusable," observing that "the distinction between blocking and degrading (such as by delaying) traffic is merely semantic."[11] Of course, access tolls—tolls charged for "simply for delivering traffic to" an end user—are also inherently discriminatory, because a broadband provider cannot,

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[6] *See* FCC Chairman: More Competition Needed in High-Speed Broadband Market, Fact Sheet, available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-329160A1.pdf. And even those who are fortunate enough to have two options, who are technically expert enough to understand what performance problems are caused by their broadband Internet access service provider's misconduct, and who are able to obtain reliable information that the other potential provider does *not* engage in similar misconduct, typically face significant switching costs. *See 2010 Open Internet Order* ¶ 27.

[7] *See Verizon v. FCC*, 740 F.3d 623, 645-646 (D.C. Cir. 2014).

[8] Rule 8.5. The Commission adopted a similar but not identical rule for mobile service.

[9] Rule 8.7.

[10] *2010 Open Internet Order* ¶ 67 (emphasis added).

[11] *Id.* ¶ 66 (citation and internal quotation marks omitted).

as an economic matter, effectively charge itself or its affiliate an access toll.[12] For this reason, access tolls are also inconsistent with the prohibition on unreasonable discrimination.

Notwithstanding the Commission's ban on tolls "simply for delivering traffic to" end users, some broadband Internet access service providers have imposed precisely such tolls. As various parties have explained, these eyeball providers have the ability to impose access tolls not only on their last-mile network but also at the point of interconnection between their last-mile network and other networks.[13] Put simply, a last-mile eyeball broadband Internet access service provider intent on extracting tolls or discriminating against competing services can erect its tollbooth either on its last-mile network or at the point of interconnection between its last-mile network and another network. While there was no question that the Commission's 2010 rules prohibited such tolls on the last mile, some broadband Internet access service providers have argued that the Commission left open a loophole to permit tolls at the point of interconnection. Yet, no matter where these providers sets up their tollbooths, they are acting on the same harmful incentives and the harm to the Open Internet is the same.

The Commission must ensure that its new rules will effectively protect the Internet. It must prohibit access tolls by broadband Internet access service providers no matter how, or where, those providers attempt to impose them. It can do so by adopting rules prohibiting blocking and discrimination similar to its 2010 rules, and, in order to ensure that broadband Internet access service providers do not simply move the tollbooth to the point of interconnection, the Commission should adopt a similar rule to prohibit access tolls at the point of interconnection:

> **No Unreasonable Interconnection Charges:**
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> A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall interconnect on a bill-and-keep basis with other network operators and edge providers for the exchange of Internet traffic between such person's customers and the customers of the other network operator or the edge provider on just, reasonable, and nondiscriminatory terms and conditions.

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[12] *Id.* ¶ 67.

[13] For example, Level 3 has explained that Verizon attempted to impose just such a toll at the point of interconnection between its network and the Level 3 network. Even though the Verizon and Level 3 networks had plenty of additional unused capacity available, Verizon refused to allow Level 3 sufficient interconnection capacity unless Level 3 would agree to pay a toll to "open the door" for more traffic. As a result, only a fraction of the Level 3 traffic bound for the Verizon network was successfully transmitted; the rest was blocked by Verizon's conduct. *See* Mark Taylor, Level 3, Verizon's Accidental Mea Culpa, at http://blog.level3.com/open-internet/verizons-accidental-mea-culpa/. *See also* Letter from Joseph C. Cavender, Level 3, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 2-3, 9 (filed Oct. 27, 2014).

> At a minimum, a person subject to the requirements of this paragraph shall interconnect on a bill-and-keep basis with a person requesting interconnection if the person requesting interconnection will transmit to or receive from the other person's network at least a reasonable minimum amount of traffic and the person requesting interconnection agrees (i) to interconnect at reasonable locations and (ii) to reasonably localize the exchange of Internet traffic.

This proposed rule is simple and narrowly focused. The rule targets the same harm the Commission focused on in its 2010 no-blocking rule: the danger that broadband Internet access service providers[14] might close the door to their network for anyone who will not pay a fee, charging a toll that cannot be avoided "simply for delivering traffic to" the provider's end users. The proposed rule would not apply to any other form of Internet traffic exchange. It would not apply to the highly competitive transit market, to peering between backbone providers, to backhaul agreements, to the market for content delivery network (CDN) services, or any other form of Internet traffic exchange services.

The first part of the proposed rule tracks the *2010 Open Internet Order's* language prohibiting access tolls. The *2010 Open Internet Order* stated that it would not be permissible for a broadband Internet access service provider to charge a toll that could not be avoided simply for delivering traffic to that provider's end-user customers.[15] Likewise, the proposed rule prohibits these providers from imposing a toll on interconnection that cannot be avoided. It requires that there be *some* reasonable terms on which an entity can exchange traffic, with adequate interconnection capacity,[16] with the broadband Internet access service provider without paying a toll for the provider to open the door to its network. And the rule requires that the broadband Internet access service provider offer those terms on a non-discriminatory basis (*e.g.*, Verizon could not offer materially better terms to AT&T than it offers to Comcast).

The second part of the proposed rule is designed to provide additional guidance and eliminate disputes. It clarifies that access tolls are impermissible when a network provider requesting interconnection with a mass-market broadband Internet access service provider is

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[14] The proposed rule relies on the Commission's existing definition of broadband Internet access service. *See* 47 C.F.R. § 8.11(a) (defining broadband Internet access service as "[a] mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints….")

[15] *2010 Open Internet Order* ¶ 67.

[16] The requirement that broadband Internet access service providers interconnect on a bill-and-keep basis on reasonable terms means that these providers may not use congestion to extract tolls from those with whom they interconnect. Broadband Internet access service providers must provide adequate interconnection capacity, and augment interconnection capacity on a reasonable basis as necessary, to support the exchange of traffic. A reasonable rule of thumb could be that an interconnection port that exceeds 70 percent utilization in either direction for more than 3 hours per day for more than 10 days in 30 should be augmented in a timely fashion to avoid congestion.

willing to localize Internet traffic[17] and interconnect at reasonable locations,[18] regardless of factors irrelevant under such circumstances such as traffic ratios or the type of lawful content transmitted. Under those circumstances, the broadband Internet access service provider is merely opening the door to its network and any charge would be, in the words of the *2010 Open Internet Order*, impermissible because it would be an unavoidable charge for delivery.[19] Of course, as long as broadband Internet access service providers comply with the provisions of the rules, parties are free to negotiate alternative arrangements.

It bears emphasizing that the proposed rule, while well suited to prohibit the same sorts of access tolls prohibited under the 2010 no blocking rule, would not apply beyond this narrow scope to the highly competitive transit market. Many Internet transit providers do not provide broadband Internet access service as defined in the Commission's rules,[20] and therefore would not be subject to the rule—just as they have not been subject to the Commission's Open Internet rules to date. But even for providers like AT&T, Verizon, or Comcast that *do* provide mass-market broadband Internet access service, the proposed rule would *not* limit their ability to compete in the transit market. That is because the rule addresses only interconnection "for the exchange of Internet traffic between the [provider's] customers and the customers of the other network operator." Transit service is different: a transit operator offers access to the *entire* Internet. Thus, this proposed rule imposes no limitations on a broadband Internet access service provider's ability to offer transit services, even to those with whom they also peer.

Further, the proposed rule does not prevent or otherwise inhibit broadband Internet access service providers from offering backhaul, CDN, or other services, whether to other Internet Service Providers or directly to edge providers. To the contrary, the rule restricts charges only when a requesting network is willing to localize traffic. In other words, the rule prohibits charges in cases where the requesting network is willing to deliver traffic requested by an eyeball broadband Internet access service provider's end users to the doorstep of that provider. Thus, the proposed rule prohibits charges in situations where the costs borne by the broadband Internet access service provider amount to costs that it would bear regardless of the nature of the content or service on the Internet its end user chose to access. If, on the other hand, the network provider requesting interconnection does not wish to localize traffic, but instead wishes to utilize the broadband Internet access service provider's backbone network, the broadband Internet access service provider would be able to sell such a backhaul service. Crucially, however, a broadband

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[17] For example, traffic is reasonably localized if it is localized to the nearest top 25 MSA, or closer, to the end user, if the broadband Internet access service provider has network facilities in the MSA.

[18] Carrier-neutral facilities are reasonable locations to choose to interconnect; in the event of any dispute, it should be presumptively unreasonable for a broadband Internet access service provider to demand to interconnect in its own facility if there is a carrier-neutral facility within reasonable proximity.

[19] *2010 Open Internet Order* ¶ 67.

[20] *See* 47 C.F.R. § 8.11(a).

Internet access service provider would not be able to use its bottleneck control over access to its users to *require* any other provider to purchase backhaul services; instead, it would have to actually compete against other backhaul and transit providers to offer a valuable service at a competitive price.

Finally, application of the proposed rule is limited to those entities that have a reasonable amount of traffic to exchange (either send or receive) with the mass-market broadband Internet access service provider. In this way, the broadband provider can be assured that it will not have to agree to exchange traffic inefficiently with providers that have little traffic to exchange with it.

This proposed rule, which is narrowly tailored to address the specific Internet interconnection issue identified by the Commission and thoroughly documented in the docket of this proceeding, would offer benefits to consumers, transit providers, content providers, and broadband Internet access service providers alike. The rule would also resolve disputes that have harmed end users and would ensure that the Commission's rules achieved the goal they were intended to: effectively protecting the Open Internet.

COMPTEL urges the Commission to adopt the rule proposed herein.

Sincerely,

/s/Angie Kronenberg
Angie Kronenberg

cc: Jonathan Sallet
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